No. 20834

IN THE

United States Court of Appeals For the Ninth Circuit

BAKER & FORD CO., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING CO.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANTS

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1. Note: Herein "R' refers to Volume 1 of the Transcript of Record being the court papers (R. 1-178) and "T" refers to Volume 2, being the Transcript of Proceedings before the District Court (T. 1-773).

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Appellants denied the jurisdictional allegations. (R. 41).

The trial court found that appellee was a corporation having its principal office and place of business in Portland, Oregon; that appellant Baker & Ford Co. is a Washington corporation having its principal place of business in Bellingham, Washington; and that appellant Fidelity & Casualty Company of New York is a corporation organized under the laws of the State of New York transacting business as a surety company in Alaska (R. 82-83). The trial court further concluded that it had jurisdiction of the subject matter and the parties under the Act of Congress of August 24, 1935, 40 U.S.C. 270(a)—270(e) commonly known as the Miller Act, and had ancillary jurisdiction over the parties with reference to appellee's claim for repairing water leaks (R. 91).

This appeal pursuant to 28 U.S.C. 1291, was timely noticed (R. 167).

STATEMENT OF THE CASE

Baker & Ford Co., hereinafter referred to as appellant, during the years 1959, 1960 and 1961, was engaged as prime contractor under numerous different contracts in the construction of space detection facilities, commonly referred to as a Ballistic Early Warning Missile Site (B.E.W.M.S.) at Clear, Alaska, under contracts with the United States Department of Defense through the Corps of Engineers. The total volume of work accomplished by appellant was in excess of $20,000,000.00.

One of the contracts was identified as DA-92-507-eng-1302, referred to in this record as "1302," which was for a composite building consisting of two dormitory wings with eating and recreational facilities lying between. This contract was for the amount of $3,666,-499.00. Appellee was the mechanical subcontractor on this contract, the amount of its subcontract being $669,-500.00. Appellee was also doing subcontract work for other prime contractors on the site but with one minor exception (having reference to Contract 1298 with which we are not here concerned) and miscellaneous force account work, (referred to as temporary work in the record) the only work performed for appellant by appellee under contract related to 1302.

The subcontract between the parties (Ex. H) dated June 25, 1959, provided:

> "3. That the labor and materials to be furnished, and the work to be performed by the subcontractor are as follows: *All mechanical work* for a complete installation on Contract DA-95-507-eng-1302 . . ." (Italics ours).

Work was commenced in June 1959 but because of strikes on the part of two crafts, very little progress was made during the summer of 1959. (All outside work must be done in the late spring, summer, and early fall on account of the weather in this area, which is approximately sixty miles from Fairbanks).

Recognizing that the original completion dates hereinafter set forth could not be met, the Government and Baker & Ford entered into discussions as to when the

job could be completed, this particular job being extremely important with respect to activation of the rest of the site, as it provided the housing for the operating personnel. These discussions continued on into June of 1960 with different agreed completion dates.

Following is a summary of agreed completion dates:

The original contract called for- final completion on May 31st, 1960 (Ex. O).

Exhibit 38, letter from the Corps of Engineers dated October 9, 1959, requests August 31, 1960, completion. This not appearing feasible, the parties subsequently agreed, in January of 1960, to fix the completion dates on a phase basis, as follows:

First wing, October 15, 1960
Second wing, November 15, 1960
All other, December 15, 1960

(Exs. 27, 28). This change was formalized in Mod. 6. Just prior to the commencement of the 1960 construction season, on April 29th, the contractor and the Government agreed that an earlier delivery date was practical (Ex. 25). The agreement for the new completion dates was formalized by Mod. 11 (Ex. 26), dated June 27, 1960. The new completion dates which were ultimately substantially complied with provided for completion as follows:

First wing, September 15, 1960
Second wing, October 15, 1960
All other, November 15, 1960

Appellee brings this action, among other things, to recover for claimed additional costs by virtue of the Government and the appellant moving the phase completion dates up by one month or, as it states in its complaint, because of a direction to appellee to "expedite and accelerate the work in order to complete the same in advance of the time allowable under the terms of the subcontract, "asking additional costs in the sum of $137,-254.96. (Supplementary Complaint, paragraph X, R. 36). The court, in its Findings of Fact, paragraphs XI, XII, XIII, XIV, XV and XVI, (R. 87-89), found in favor of appellee and assessed the amount of $80,519.24 as the reasonable value of the "extra work required of use plaintiff in accelerating the work . . ."

Appellant, by its answer (R. 41, 42) denied that it had directed the plaintiff to accelerate its work and through all of the witnesses involved, both appellants' and appellee's, established that appellant had prepared, on April 8, 1960, a construction schedule to be met by the prime contractor and all subcontractors which construction schedule was disseminated to all subcontractors on April 22, 1960 (Ex. 1). Further that this construction schedule, notwithstanding any agreements with the Government, called for completion dates as follows:

First wing, September 15, 1960
Second wing, October 15, 1960
All other, October 15, 1960

thus calling for final completion two months prior to that agreed to by Mod. 6 and one month prior to that

ultimately agreed to by Mod. 11 (Ex. 26). All of the testimony is to the effect that good construction planning practice, particularly in cold-weather country and where $2,000.00 per day liquidated damages are present in the contract, (Ex. O), calls for establishing as early a target date as is possible. (Tr. 64-5; 128-9; 392, 397-400; 431). This construction schedule was agreed to by the contractor and all subcontractors and was the only master schedule from which they worked from April to completion, notwithstanding different dates established by agreement between appellant and the Government (T. 64; 126-128). In fact, appellee had no knowledge of the existence of any other agreed completion dates (Mods. 6 and 11), until February, 1961, long after the job was completed (T. 110-112, 125-126, 274).

The precise question involved with respect to this claim of appellee is whether, under the terms of the subcontract (Ex. H) particularly paragraphs (d) and (e), (1) the contractor ordered "extra work or made changes by altering, adding to or deducting from the work" included in the subcontract by executing Mod. 11; (2) the subcontractor incurred additional costs as a result thereof of the reasonable value found by the court and (3) the impact of paragraph (e) of the subcontract, to the effect that no claims for extras should be made unless fully agreed upon in writing prior to the performance of any such extra work.

Additional questions involved relate to Findings VII (a), (b) and (c) (R. 84-85) having respect to extra work. Appellee, in its supplementary complaint, (R. 33-

38), alleged that these items, among others, were over and above the subcontract requirements and constituted extra work under paragraph (d) of the subcontract. Appellant, by its answer (R. 41-42) denied, taking the position that all of the work required was "plumber's work," under the jurisdiction of the United Association of Plumbers and Steamfitters, and that the language of the subcontract requiring subcontractor to furnish "all mechanical work for a complete installation" together with the pertinent specifications, placed this work within the scope of the subcontract.

So, with respect to these latter items, the precise question is whether, in fact, (1) they were extra work, (2) done at the appellant's request, (3) agreed upon in writing prior to the performance of such work, and (4) the evidence adduced on behalf of appellee was sufficient to establish the reasonable value thereof.

The remaining item, Finding VII(d), (R. 85) repair of water main leaks, involves the same questions and in addition, raises a further question.

Under all of the testimony, this work was done as force account work on a pre-existing camp, not a part of Contract 1302. Under these circumstances, the court did not award judgment against appellants jointly but only as against appellant, Baker & Ford Co., the work not coming within the scope of the Miller Act.

Baker & Ford contend that they, having raised the jurisdictional question by their answer, (R. 41-42) and the appellant and appellee both being out of state cor-

porations, the court had no jurisdiction whatsoever with with respect to this item.

Further, there is no competent proof as to the reasonable value of the amount claimed and awarded, or that appellant directed the repair of more than one of the three leaks involved.

SPECIFICATIONS OF ERRORS

1. The court erred in entering the following Findings of Fact: (R. 82-93):

A. *Finding VI.* (R. 84). As shown by Finding V, the last work performed under the contract in question by appellee was in October 1961. The original complaint was filed October 31, 1961, less than ninety days from the date on which the last of the labor was performed and material furnished by appellee.

B. *Findings VII(a) and (b)* (R. 84-5). These items were not extra work under the contract documents consisting of the plans, (Ex. 30) specifications (Ex. II 1-2) and subcontract (Ex. H), and no competent testimony was given as to the reasonable value of the work performed and material furnished.

C. *Finding VII(c)* (R. 85). This item was not extra work under the contract documents consisting of the plans, (Ex. 30) specifications (Ex. II 1-2) and subcontract, (Ex. H) was not ordered at the special instance and request of the appellant, (T. 45) and there was no evidence whatsoever regarding the reasonable value of the alleged extra work.

D. *Finding VII(d)* (R. 85). This was not extra work under Contract 1302 or under the subcontract; the charge is allegedly for repairing three leaks, while the testimony relating to the work being done at the special instance and request of appellant has reference to only one leak and the testimony respecting the reasonable value having reference to only one leak.

E. *Finding IX* (R. 85-6). All of Finding IX is erroneous with the exception of the fact that the appellant did agree with the United States, on or about April 29, 1960 (Ex. 25) informally, to accelerate the previously fixed completion dates by one month each. Modification Number 11 (Ex. 26) dated June 24, 1960 and executed on June 27, 1960, included a price which set forth an increase in contract price based on Exhibit 25 as consideration for the general contractor advancing completion date by one month, "evacuate warehouse 'B' and turn over to the resident engineer by not later than 6 May 1960" and the price "to include the cost of a temporary warehouse structure" to be "dismantled and removed by 30 November 1960." The court erred in giving consideration to the price set forth in Exhibit 26 and even when doing so, not taking into consideration the costs of evacuation of warehouse, re-erection and dismantling. The court also erred in making the findings contained in the last two full sentences of IX relating to the furnishing and erecting of camp facilities in connection with Contract 1282 with which appellee was not involved and in finding that said Modification Number 32 (Ex. 34-35) included additional *maintenance* for the

acceleration of Contract 1302, Mod. 32 having reference solely to additional work with respect to Contract 1282 and providing only for additional housing and messing facilities which were originally government furnished.

F. *Finding X* (R. 86-7). As appellee had agreed to schedule his work under the general contractor's construction schedule in April 1960, (Ex. 1) which called for all outside utility work to be completed by September 15, 1960, the setting up of completion dates per Mod. 11 (Ex. 26) did not in any wise alter said previously agreed to construction schedule.

Neither was the work of appellee's subcontractor, Read Sheet Metal Works, accelerated. His increased cost proposal (Ex. 17) was based on a September 15, 1960 final completion (T. 83-5). He actually completed on September 19, 1960 (T. 83-4). He had until October 15, 1960, to complete, in which event there would have been no additional costs (T. 83-5).

G. *Finding XI* (R. 87). There is no support in any of the evidence for the finding that appellant directed and required appellee to accelerate as set forth. All of the testimony is that no such directions were ever given (T. 66, 129-31, 275-6, 276-7). Neither is there any competent testimony respecting the means to accomplish said acceleration as set forth in the last full sentence of this finding, the weight of the testimony being to the effect that moving the schedule up by one month out of the winter season would, in fact, result in no additional costs(T. 409-11).

H. *Finding XII* (R. 87). The evidence preponderates against the factual findings herein contained; neither was the last change of dates a change in the parties' subcontract; neither was the construction schedule referred to in Finding VIII (Mod. 6) a matter of contemplation of the parties as appellee had no notice or knowledge of its existence.

I. *Finding XIII* (R. 87). There was no competent testimony to support this finding. The admission of appellee's Exhibit 29, on which the finding is partially based, was objected to (R. 55-7). The testimony in support thereof, given only by Mr. Urban, was incompetent in that he was without personal knowledge of the facts on which his opinions or estimates of scope and value were based; appellee having failed to sustain its burden of proof and the evidence preponderating against it.

J. *Finding XIV* (R. 88). Appellee failed to sustain its burden of proof with respect to this finding and the evidence preponderates against it, and any such additional costs were not incurred at the special instance and request of appellant.

K. *Finding XV* (R. 88). There is no evidence showing an obligation of appellee to pay the Alaska Business Tax or bond premium of 1 per cent referred to, any obligation respecting the bond premium being that of Baker & Ford directly to the bonding company (Ex. H). Neither is the allowance for overhead and profit proper as they are excessive and computed on items which per se include overhead and profit.

L. *Finding XVI* (R. 88). There is no competent evidence of the increased costs herein set forth or the reasonable value of accelerating the work specified for the reasons herein set forth.

M. *Finding XVIII* (R. 89). The evidence preponderates that appellant was not indebted to appelle in any sum save and except items of an unliquidated nature and no interest is due. Item Number 3 of Exhibit 31, being interest in the amount of $937.23 computed on the principal amount of $17,851.55, has reference to *temporary work,* (T. 96, 118-120) (See first paragraph of Ex. U) which is not a part of Contract 1302, thus not within the trial court's jurisdiction.

Further, there is no showing when any amount set forth on Exhibit 31 became due under the payment clause of the subcontract. Paragraph (c), Ex. H, provides:

> "Final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work. . . ."

The court found (Finding V, R. 83) that appellee did not complete its work under the subcontract until October, 1961, yet it allowed interest from January 1, 1961 (Ex. 31).

N. *Finding XIX* (R. 90). Appellee has not sustained its burden of proof in this regard and the evidence preponderates against this finding. In fact, on only one occasion was a verbal order given, that being after the job was completed (T. 97, 121).

O. *Finding XX* (R. 90-91). The files and records

demonstrate the erroneousness of this finding, as considering the amount sued for and the amount appellee is entitled to recover, even assuming this court affirms the lower court in toto, the appellants would still be the prevailing parties.

P. *Finding XXI* (R. 91). The evidence clearly shows that as to the second full sentence it should read, "plaintiff additionally used approximately 2851½ man camp days subsistence in the performance of all its contracts and work at the site."

II. The court erred in entering the following Conclusions of Law (R. 91, 92):

A. *Conclusion I.* This action was brought prematurely under the Miller Act and the court did not obtain jurisdiction ancillarily of appellant, Baker & Ford Co. respecting appellee's claim for repairing water main leaks.

B. *Conclusion II.* For the reasons set forth in I. B, C, E, F, G, H, I, J, K, L, M and N above.

C. *Conclusion III.* For the reasons set forth in I. D, above.

D. *Conclusion IV.* For the reasons set forth in I. O, above.

III. The court erred in entering paragraphs 1 and 2 of the Judgment (R. 94) for the reasons set forth in paragraphs I and II above.

IV. The court erred in failing to grant appellant's Motion for New Trial (R. 96) for all of the reasons set forth herein.

V. The court erred in failing to grant appellant's Motion for Amendment of Findings (R. 97) for all of the reasons set forth herein.

VI. The court erred in failing to enter appellants' Proposed Amended Findings of Fact and Conclusions of Law (R. 101-105) for all of the reasons set forth herein.

VII. The court erred in admitting the following exhibits over the objection of appellants, the admission of which was prejudicial to the rights of appellants.

A. *Exhibit* 3. Letter dated 8-3-59 to Baker & Ford from Urban Plumbing & Heating, respecting repairs to water line (T. 60). Objected to on the grounds that "there is no proper foundation as to who prepared the breakdown of costs set forth therein or from what information such breakdown was obtained"(R. 55).

B. *Exhibit* 19. Invoice, Urban to Baker & Ford dated November 18, 1960 (T. 40-41). Objected to as "no proper foundation showing by whom or from what source this invoice was prepared" (R. 57). The witness, Martindale, merely identified the time sheet accompanying the invoice without any substantiations as to reasonableness of the entries.

C. *Exhibit* 21. Invoice, Urban to Baker & Ford dated November 18, 1960 (T. 39). Objected to as "no proper foundation showing by whom or from what source this invoice was prepared" (R. 57). The witness, Martindale, not filling in this gap nor testifying as to the reasonableness of the items going to make up the invoice.

D. *Exhibit* 29. Consisting of summary and eight schedules setting forth appellee's acceleration claim (T. 187-277). Objected to as "no proper foundation showing the sources of figures used throughout the exhibit or by whom prepared; is a self-serving document if prepared by Urban employees;" (R. 57) further objected to throughout the direct and redirect examination of witness, Urban, (T. 187-234, 278-287, 290-293) on the grounds that the schedules were mere estimates on the part of witness, Urban, based on heresay, he not having personal knowledge of the alleged facts from which the conclusions were drawn. Neither were any supporting books, records or invoices introduced or made available for examination from which the various schedules were supposedly prepared (T. 571-2).

E. *Exhibit* 34. Change order, Modification Number 32, Contract 1282, dated 24 June 1960 (T. 298-300). Objected to (T. 299, R. 57) as being incompetent, irrelevant and immaterial, this relating to a contract separate and apart from 1302. It is apparent from the argument of appellee's counsel for its admissibility (T. 299-300) that the exhibit is for the purpose of showing what monies appellants received on the various other jobs at Clear which could have no bearing on the rights of these parties with respect to Contract 1302.

F. *Exhibit* 35. Change order, Contract 1282, dated 3 February 1961 (T. 298-300). Objected to (T. 299 (R. 57), as being incompetent, irrelevant, immaterial, this relating to a contract separate and apart from 1302.

It is apparent from the argument of appellee's counsel for its admissibility (T. 299-300) that the exhibit is for the purpose of showing what monies appellants received on the various other jobs at Clear which could have no bearing on the rights of these parties with respect to Contract 1302.

G. *Exhibit* 41. Communications between Alaska District Engineer and Alaskan Air Command dated 30 March 1960, 21 April 1960 and 28 April 1960 (T. 404). Objected to as being records of others not a party to this action, with no showing of notice or acquiescence on the part of the parties to this action and as being heresay, (T. 402-404) and as being incompetent, irrelevant and immaterial (R. 57).

VIII. The court erred in admitting the following testimony which was objected to:

A. Testimony of Robert E. Brewer to the effect that the amount referred to on Exhibit 3 for repair of three water main leaks was the fair and reasonable cost, the objection being made that "the witness testified he was only present at one break, and there is no proper foundation that he is acquainted with the three breaks that were mentioned, as to what went into them"(T. 100-101).

B. Testimony of Fred Urban respecting how much appellee's total labor cost on Contract 1302 overran appellee's estimate. Objected to as not being the best evidence (T. 190-191).

C. Testimony of Fred Urban re total man days on

Contract 1302. Objected to on the ground that no proper foundation laid and no showing that the claimed additional man days were used on Contract 1302 (T. 193-194).

D. Testimony of Fred Urban to the effect that $4,349.81, as shown on Schedule IV, Exhibit 29, was a fair and reasonable charge for expediting freight. Objected to on the ground that no proper foundation was laid; that the witness had no knowledge concerning this matter, he having just compiled the figures furnished by another person (T. 209-210).

E. Testimony of Fred Urban re additional man days for increased subsistence, Schedule VIII, Exhibit 29, $12,600.00. The witness testified that this calculation was made by a Mr. Way (T. 215-216, 261). Objected to as heresay and there being no proper foundation (T. 216-217).

F. Testimony respecting Contract 1282 and the amounts thereof given by F. Murray Haskell. Objected to as not being material or relevant to the issues in this case (T. 532-33).

G. Testimony of Fred Urban respecting the contents of eight schedules and the summary of Exhibit 29, objection to said exhibit having been made at the outset of the trial (R. 57) and objections to the exhibit and testimony relating thereto having been made throughout the direct and redirect examination of the witness on the grounds that said exhibit and the testimony relating thereto were mere estimates on the part of the wit-

ness, Urban, based on heresay, he not having personal knowledge of the alleged facts from which the conclusions were drawn (T. 187-234, 278-287, 290-293).

IX. The court erred in sustaining objections to the following questions:

A. Question to L. A. Bernardi on behalf of appellants:

"Q. Will you state whether or not the piping and hookup of that kitchen equipment as relating to bringing in the water and sewer and the rest of it is plumber's work?"

Objection was made on the ground that this was a conclusion, which the court sustained (T. 315).

B. Question to L. A. Bernardi on behalf of appellants:

"Q. Under the Union, do you know what Union claims jurisdiction of that type of work at Clear?"

(Referring to piping and hookup of kitchen equipment) Objection was made on the ground that the question was irrelevant, which the court sustained (Tr. 315).

Both A and B above, refer to Finding VII (a) and (b), the purpose of the proposed testimony, of course, being to show that this work being plumber's work, it falls under "all mechanical" scope of the subcontract.

C. Question to F. Murray Haskell on behalf of appellants:

"Q. Would you have been able to keep your men if you had remained on 6 8's and the others were on 6 9's?"

to which appellee made the following objection: "If the

court please, objection," which was sustained (T. 530).

D. Question to F. Murray Haskell as follows:

"Q. And what would you state that was a result of the fact that you all went on 6 9's?"

Objected to on the grounds of relevancy which objection was sustained.

The questions under C and D above were for the purpose of showing that with respect to the acceleration claim, Schedule I, Exhibit 29, the appellee did not voluntarily change from 6 days of 8 hours each to 6 days of 9 hours each because of any acceleration, but rather because of pressure brought to bear by the Plumbers' Union on all of the master plumbers in the area and that in the absence of such a change, the master plumbers would not have been able to retain personnel.

SUMMARY OF ARGUMENT

Part One—Acceleration

Findings IX through XVI; (R. 85-90) (Specification of Errors I. E, F, G, H, I, J, K, L, and M; II. B; VII. D, E, F and G; VIII. A, B, C, D, E, F and G; IX C and D) Judgment for $80,519.24.

Appellant contends that:

(1) There was no acceleration, in fact, and as a consequence there was,

(a) no extra work performed beyond the scope of the subcontract and

(b) at the special instance and request of appellant, and

(2) that if any change in the scope of the subcontract was made it was not agreed to in writing between the parties and the appellee is therefore estopped, under the terms of the subcontract, to claim extras, and

(3) no competent proof was adduced on behalf of appelleee to support its claim as to the reasonable value of the extra work, if any.

Part Two—Items of Work

(Finding VII; R. 84-5) (Specification of Errors I. B, C and D)

Appellant contends as to the first three items:

(1) They were not extra work under the contract,

(2) Were not agreed to in writing between the parties as provided by the subcontract and the appellee is therefor estopped from claiming extra remuneration, and

(3) There is no competent evidence as to the reasonable value of the alleged extra work performed.

As to Item 4, Finding VII D, appellant contends, in addition to the above, that this constituted "temporary work" separate and apart from the contract, and accordingly was not before the trial court under the Miller Act.

Part Three—Prior Agreement in Writing as to Extras

(Finding XIV; R. 99) (Specification of Errors I. N)

Appellant contends that the terms of the subcontract in paragraph (e) preclude any recovery by appellee

for any extras, said provision requiring that all claims for extras shall be fully agreed upon in writing prior to the performance of any extra work. Appellee submits that there is no evidence of any waiver of this provision.

Part Four—Interest

(Finding XVIII; R. 99) (Specification of Errors I. M; II. B)

Appellant contends that there is no interest recoverable, the amounts in question being of an unliquidated nature but in any event, having been paid within a reasonable time after completion and acceptance per paragraph (c) of the subcontract.

Part Five—Attorney Fees

(Finding XX; R. 90-1; Conclusion IV) (Specification of Errors I. O and II. D)

Appellant contends that considering the amounts sued for and the amount of recovery, the appellant was the prevailing party and the attorney fees should be offset.

Part Six—Bond Premium, Business Tax, Overhead and Profit

(Findings XV and XVI; R. 88-9) (Specification of Errors I. K)

Appellant contends that there is no proof to support the allowance of bond premium, Alaska Business Tax, overhead and profit; as to the latter two items, particularly where overhead is figured on overhead and profit

is computed on rental of the subcontractor's own small tools and equipment.

Part Seven—Jurisdiction

(Conclusion I; R. 91; Findings VI and VII D; R. 82) (Specification of Errors I. A and D; II. A)

Appellant contends that the trial court was without jurisdiction, the action having been prematurely commenced and was without ancillary jurisdiction over that portion of the action not coming under the Miller Act.

ARGUMENT

Part One—Acceleration

We will direct the first portion of our argument to the so-called "acceleration" claims of appellee, the erroneous Findings relating thereto being IX, X, XI, XII, XIII, XIV, XV and XVI (R. 85-90). (Specification of Errors I. E, F, G, H, I, J, K, L and M; II B, VII D, VII E, VII F, VII G, VIII A, VIII B, VIII C, VIII D, VIII E, VIII F, VIII G, IX C and IX D). The trial court awarded judgment under these Findings in the amount of $80,519.24.

It is appellant's position that the above Findings are clearly erroneous, they not being supported by any substantial evidence and the Findings should, therefore, be set aside in their entirety. 28 USC Rule 52(a). There is no conflict in the material evidence respecting this claim, these Findings being the result of the district court permitting the introduction of testimony and exhibits to the prejudice of appellants which evidence was clearly incompetent, for the most part based on hearsay, and the

court's misinterpreting the effect and substance of that evidence.

In order to recover, appellee, of course, must show by competent evidence, inter alia, that:

(1) Extra work was performed beyond the scope of the subcontract, and

(2) At the special instance and request of the appellant.

The gravamen of appellee's complaint with respect to this "acceleration" claim is set forth in paragraph X of its supplementary complaint (R. 36) and in paragraphs VIII through XVI of the Findings (R. 85-9). Appellee says, in effect, that because appellant agreed to complete this job one month earlier than it had previously agreed to, there was a change in the scope of the contract requiring extra work. The pertinent dates in this regard are set forth in the Statement of the Case herein. (Pages 4 and 5). We are here particularly concerned with the change in phase completion dates between those set out in Exhibits 27 and 28, formalized in Mod. 6 and the completion dates set out in Mod. 11 (Ex. 26). The effect of the latter was to move the phase completion dates forward by one month.

Did this change of completion dates constitute extra work beyond the scope of the subcontract?

The original completion date under the contract (Ex. O) and hence under the subcontract (Ex. H) was May 31, 1960. When this date could not be met (T. 388, 608)

the Government requested an August 31, 1960 completion (Ex. 38). This not appearing feasible at the time, the phase completion dates of October 15th, November 15th and December 15th were agreed to by Mod. 6. The establishment of these latter dates gave the contractor, as Mr. Bernardi, the project engineer testified, about 30 days cushion on each phase (T. 392, 397-8). Not agreeing to too tight a schedule and providing for some leeway and having a 30-day cushion, particularly in winter work in Alaska, and with $2,000.00 per day liquidated damages assessable, constituted good construction practice. This was agreed to by both parties' witnesses: Martindale, (T. 64-5); Brewer (T. 129); Bernardi, (T. 397-8) and Baker, (T. 676).

In conformity with its determination that completion could be accomplished at least 30 days before the dates agreed to in Mod. 6, appellant prepared a construction schedule (Ex. I) on April 8, 1960 calling for phase completion dates as follows: First wing, September 15, 1960; Second wing, October 15, 1960; All other, October 15, 1960. The effect of this was to set the first two phases 30 days ahead of that agreed to in Mod. 6 and the last and final phase 60 days ahead. These constituted "target" dates irrespective of the contract schedule (T. 128, 340).

This construction schedule (Ex. I) was posted on the prime contractor's wall (T. 126-128) and was distributed to all of the subcontractors including Urban on April 22, 1960 (T. 338-9, 64, 166). Mr. Martindale and Mr. Brewer, Urban's two representatives at the site, had full

knowledge of Exhibit I from April 22, 1960, never objected to the schedule and agreed that they could meet same (T. 166-7, 64, 72-3). Furthermore, Mr. Martindale was advised by appellant (referring to Ex. I) "if we could make it, fine, and if we couldn't we didn't have to," (T. 72-4). Weekly meetings were held at which time the construction schedule was always a subject of discussion (T. 52-3, 339-40). No one, including appellee, took exception to the dates proposed in Exhibit I (T. 340-1, 73, 167). And, Exhibit I was the only construction schedule governing the progress of the work during the spring, summer and fall of 1960, although the work was finished on November 16th, a month later than that called for in the schedule (T. 74-5). (Actually finished November 20th, Ex. Z). The attempt to meet Exhibit I completion dates was a voluntary undertaking by all concerned.

After Exhibit I was published, the Government made a new direction on April 29, 1960, (Ex. 25), that the first two phases of the job be completed on the same dates as called for by Exhibit I, and the remainder of the work be completed on November 15, 1960, still 30 days after the final completion set forth in Exhibit I. This was not agreed to on April 29, 1960 as stated in Finding IX but was agreed to on June 27, 1960 (Mod. 11, Ex. 26). The effect of Mod. 11 was to change nothing with respect to this contract as the scheduling then stood, except to expose Baker & Ford to substantial liquidated damages in the event of failure to meet Mod. 11 dates. As Mr. Bernardi testified on cross-examination

(T. 408-11, 434), he didn't believe the new schedule (Mod. 11, Ex. 26), would cost any more to perform than the Mod. 6 schedule, a priori it could cost no more to perform than the Exhibit I construction schedule.

Mod. 6 represented good bargaining on the part of the contractor in establishing "outside" dates for completion (T. 392). Exhibit I established practical dates for completion agreed to by all interested persons employed on the job. Mod. 11 (Ex. 26) merely rescinded Mod. 6 and still had a 30-day later completion date than the Exhibit I schedule.

The key inquiry is: Would Urban be heard to claim acceleration if Mod. 6 had established the completion dates ultimately used in Mod. 11? A negative answer is obvious. Thereafter, when Mod. 11 rescinded Mod. 6, establishing completion dates Urban had already agreed to in Exhibit I, how in the name of logic can it claim acceleration? *And particularly so when in fact Urban had no knowledge of any change of completion dates or so-called "acceleration" until February 1961, long after the job was completed.* This was testified to by Mr. Brewer, (T. 110-112, 125-126) and Mr. Urban stated that he did not know about Mod. 11 until long after the meeting at the Washington Athletic Club which was held in February 1961 (T. 274). It is quite obvious that Urban voluntarily chose to comply with the contractor's construction schedule (Ex. I) and absent any knowledge of acceleration until more than two months after completion and absent any objection to the completion dates proposed by the contractor, there is no support in the

evidence for a finding that the voluntary meeting of these completion dates constituted extra work beyond the scope of the contract.

And what of the allegations and Findings that this non-existent acceleration was done at the special instance and request of appellant (R. 36, 87), they reciting that appellant directed and required appellee to "employ more men, work longer hours, pay premium wages," etc. Each of appellee's witnesses was specifically asked whether anyone from Baker & Ford Co. ever directed appellee to employ more men, work longer hours, pay premium wages or accelerate the work during the period in question or to go from 6 8-hour days to 6 9-hour days. In each instance the answer was negative (Martindale, T. 66; Brewer, T. 129-131; Urban, T. 276-7). Neither were there any such directives given to appellee from the Corps of Engineers (T. 276-7). In the absence of any such direction, wherein lies the proof that the extra work, if any, was performed at the special instance and request of the appellant? Particularly when appellee testifies that it did not know of any acceleration until after the job was completed (T. 110-12 125-6, 274).

An additional element for recovery, of course, is that appellee prove by competent evidence the reasonable value of the extra work performed. *Macri and Sons v. U. S.*, 313 F.2d 119, (9th C.A. 1963); *Northern Truck Line v. Dunn*, 167 F.2d 650, (9th C.A. 1948); 11 Alaska 583; *Hill v. Waxberg*, 237 F.2d 936, (9th C.A. 1956); *Central Steel Erection Co. v. Will*, 304 F.2d 548,

(9th C.A. 1962). And, where the subcontract between the parties has a provision, such as in this one,

> "(e) To make no claims for extras unless the same shall be fully agreed upon in writing by the CONTRACTOR prior to the performance of any such extra work."

The law is clear that the,

> "Evidence of a waiver of a provision in a building contract requiring a written order for alterations or extras must be clear and convincing."

9 Am. Jur., *Building and Construction Contracts,* paragraph 141; *O'Keefe v. Corp. of St. Francis Church,* 59 Conn. 551, 22 Atl. 325, 66 A.L.R. 664.

All of appellee's evidence with respect to quantum for acceleration was profferred by Mr. Urban. The court, over objection, (R. 57; T. 187-234, 261, 278-87, 290-3), admitted into evidence Exhibit 29 (T. 194, 277) and Mr. Urban's testimony in support thereof under 28 USC 1732a (T. 206-7, 216, 572, 575-6). Appellant contends the evidence was inadmissible as not meeting the requirements of that act. The law is clear the burden of proving that proffered evidence comes within the rule is on the party offering; *Standard Oil Co., of California v. Moore,* 251 F.2d 188, (9th C.A. 1957) and the offering party must lay a proper foundation that the records were made in the regular course of business; *Bisno v. U. S.,* 299 F.2d 711, (9th C.A. 1961) and where summaries are offered, of course, the original records must be identified and available for cross-examination, which they weren't in this instance

(T. 572); *Daniel v. U. S.*, 343 F.2d 785, (5th C.A. 1965). *Plymouth Village Fire District v. New Amsterdam Casualty Co.*, 130 F. Supp. 798.

As stated in syllabus 2, *Kincaid and King Construction Co., Inc. v. U.S. for use of Olday*, 333 F.2d 561, (9th C.A. 1964),

> "Exhibits relating to work performed but not made until after work has been completed and litigation respecting it begun, were not made in regular course of business, nor within reasonable time after event and were not admissible under business records statute."

With these guide lines in mind and keeping in mind that Mr. Urban was not personally present at the job during the construction period of 1960 which is involved (from May until the end of the job) (T. 260), thereby having no personal knowledge of what additional, if any, was required, let us test the several schedules which go to make up Exhibit 29 to see if they meet the test.

We must also keep in mind the fact that these schedules were made long after the work had been completed and after the litigation was commenced (T. 235-6, 677), that Exhibit 29, being a summary, consisted of an opinion of estimate of Mr. Urban based solely on hearsay, and there not even being proof that the contents thereof were taken from original records. How, in the name of heaven, could appellant, or why should appellant cross-examine on opinion and estimate based on hearsay?

Turning now to the Exhibit itself:

Schedule I. (Finding XVI, R. 88-9)

Mr. Urban stated that he prepared Schedule I, which indicated their increased labor costs from *May 1st until November 15th* which, in his opinion were incurred as the result of working their people 54 hours per week in lieu of 48 hours per week—6 9's as compared to 6 8's—*during that period of time* (T. 188-9).

It is interesting to note that the only four factual entries in that schedule were misrepresentations. The four entries follow:

1. *The amount paid per hour.* The schedule is based on Journeymen receiving $5.50 per hour. Exhibit Z, being a summary prepared by Peat, Marwick, Mitchell & Company, from the certified payrolls, shows that for the period in question Journeymen received two different rates, to-wit: $5.25 and $5.50 per hour. As to Foremen, the schedule uses a $6.00 per hour figure; Exhibit Z shows that Foremen during the period in question, received $5.75 part of the time and $6.00 part of the time. The schedule shows the General Foreman as receiving $6.50 per hour while Exhibit Z shows that his rate varied from $6.25 to $6.50 per hour for the period in question.

2. *Insurance and tax on labor.* Schedule I uses 13 per cent where it is obvious at that time from all of the testimony that 11 per cent was the proper figure (R. 74).

3. *Hours worked.* The schedule together with the testi-

mony of Mr. Urban represents to the court that 6 9's were worked from May 1st until November 15th for a total of 28,819½ hours. This was the grossest of misrepresentations as Urban did not commence working 6 9's until August 7th, 1960, which he well knew (Ex. Z, T. 87). However, Mr. Urban was initially successful in misleading the court in this regard and it was only after objections were filed to the Memorandum of Decision entered by the court that the court determined the schedule and testimony were incorrect and awarded extra compensation for working 6 9's only from August 7, 1960. This constituted a major misrepresentation resulting in 16,212 hours as opposed to the misrepresented 28,819½ hours.

4. *The size of the crew.* Schedule I supported by Mr. Urban's testimony, was based on a crew of 30 men. The fact was as set forth in Exhibit LL, the average crew from May 1st to November 20th was 18.1 men and from August 7th to November 20th, the period during which Urban switched to 6 9's, the average crew was 17.5 men.

The above are factual bases for Schedule I and the testimony in support thereof. In each instance the facts were false as disclosed by the exhibits.

The opinion evidence offered by Mr. Urban and included in Schedule I relates to two items (1) production, (2) indirect labor. We submit that there is absolutely no competent testimony to support Mr. Urban's adoption of the figures used for these two items. He states that he was not present during this portion of the work at Clear and hence would have no personal knowledge

of the production or indirect labor. Neither did he testify that he based this on any information given to him by Mr. Martindale or Mr. Brewer, who were on the site. These figures were merely an estimate or opinion on his part (T. 240-1) arrived at long after the work involved was completed (T. 235-6). They are pure speculation and conjecture. They are not supported by any substantiating or corroborating evidence or by any showing that he had any personal opportunity to observe or know the situation as it existed at Clear or elsewhere under similar circumstances. To the contrary, the testimony of appellant's witnesses, Mr. Bernardi and Mr. Haskell, both of whom were disinterested witnesses, are entitled to great weight. Mr. Haskell, having qualified as an expert (T. 516), stated unequivocally that increasing the number of men from 16 to 19 as estimated by Mr. Brewer (Exs. 8 and 9) would not effect the efficiency of the men in question, and Mr. Bernardi testified that there would be no difference in the ultimate costs by getting the work done before the cold weather set in (T. 408-11), rather than working into November and December, indicating, of course, that the efficiency of the men would be greater during the period in which the job was actually completed as opposed to continuing it on into November and December. *We submit that with reference to the opinion of efficiency, if Mr. Urban had taken into consideration the fact that most of the work was being performed during the summer as opposed to the winter months and given some credit therefor, and had claimed some loss of efficiency pos-*

sibly with respect to the 9th hour alone rather than all nine hours, his opinion testimony might have been entitled to some consideration. We further point out that there is an absolute dirth of substantiation for the indirect labor item, which the court allowed, which proportedly relates to home office costs. *What explanation is there in the record as to how that could be increased in any such amount by increasing the hours worked from 8 to 9?*

There is yet another mixed factual and opinion item included in Schedule I which the evidence does not support by anything close to a preponderance. That is the representation inherent in that schedule that appellee went to 6 9's instead of 6 8's as the result of some directive from Baker & Ford or because of the stepped up dates provided for in Mod. 11. Four logical inferences completely rebut the assumption which appelleee asked the court to draw:

(1) By all of appellee's testimony it had scheduled its work and commenced to perform its work under appellant's construction schedule (Ex. I) which was issued in April before Mod. 11 was ever considered.

(2) Appellee, per the testimony of Mr. Urban and Mr. Brewer, had no knowledge of the existence of Mod. 11 until February 1961, several months after the job was completed.

(3) By all of the testimony, including all of the appellee's witnesses, no directives were ever issued by Baker & Ford Co. or the Corps of Engineers to appellee to in-

crease the number of hours being worked, or increase the number of men, etc.

(4) Appellee did not go to 6 9's because of any acceleration; it went to 6 9's because it was forced to by the Plumber's Union.

An analysis of the testimony on this latter point we believe would be helpful: Mr. Urban testified that they went to 6 9's on May 1st and continued on that schedule until the completion of the job because of an acceleration order given by Baker & Ford. This is patently erroneous as the court later discovered from an analysis of the time sheets, Urban not going on 6 9's until August 7th, they working on 6 8's prior thereto. Further, all of appellee's witnesses testified that Baker & Ford Co. never directed them to accelerate, work longer hours, etc.

The fact is as disclosed by all of the testimony that there had been a work stoppage in the Fairbanks area in the latter part of July, 1960 (T. 132-3, 523). The Plumber's Union, in an effort to increase the hours worked on the part of their members, refused to dispatch foremen to the various jobs and the previously employed foremen would not work (T. 133-6, 528). Without foremen, the journeymen would not work (T. 136). This was not a strike in the true sense but its effect was the same, the result being a work stoppage so far as plumbers and steamfitters were concerned. As a result, numerous meetings were held at the Traveler's Inn in Fairbanks between the master plumbers and between the master plumbers and the Union during the

first week in August (T. 136, 524). On or about the 6th or 7th of August, all of the master plumbers in the Fairbanks area yielded to the demands of the Union and commenced working 6 9-hour days (T. 137, 529-30) instead of 6 8-hour days which had been the pattern for the year 1960 (T. 523, 131). As Mr. Brewer said, all of the mechanical subcontractors in the area increased their hours about this time because of lack of manpower (T. 137), which is another way to say that the increase was necessitated because of the plumber's walkout—he did not state that the increase was occasioned by any acceleration or directive. Mr. Martindale was asked why appellee went on 6 9's and he affirmed it "was because all of the other plumbers in the area did" (T. 89). It is obvious that this was the only reason and it is obvious that it was not because of any acceleration.

To further refute the position of appellee in this regard, we call the court's attention to the fact that appellee continued on 6 9's until the completion of the job even when in the latter stages its work force was reduced to a fraction of its peak (Ex. Z).

In passing this point we should like to point out that the Haskell Corporation, of which Mr. Haskell is the president, by all of the testimony was the largest single master plumber at Clear and they were not on any accelerated schedule but were forced to go to 6 9's the fore part of August as were all the others (T. 529-30).

It is interesting to note that no attempt was made to have Mr. Brewer or Mr. Martindale, in their testimony,

substantiate or corroborate Schedule I. Mr. Brewer merely stated that Schedule I was prepared by Mr. Urban. Apparently, he wanted to go no further. Mr. Brewer could hardly have gone any further in his testimony as his corrected proposals (Exs. 8 and 9) do not support Schedule I.

As we will show, these proposals were based on what was a fair and reasoned analysis by the resident superintendent, Mr. Brewer, subject to correction for the mathematical errors contained in them. The basic error in computation was in arriving at 495 additional projected man days instead of 95 additional projected man days for the November completion. This was reasonably close, as the evidence, as outlined hereinafter, will show that the actual additional man days for the November 20th completion over and above the projected man days for December 15th completion was, in fact, 37

The error in Mr. Brewer's computation of 400 man days was pointed out to him on cross-examination (T. 149-156) and in the examination of Mr. Bernardi (T. 347-8). Exhibits 8 and 9 were based on the premise that 16 man units would be required for 190 work days if the job were to run from May 1st to December 15th. 190 days times 16 man units per day equals 3040 man days. The exhibits were also based on the premise that 19 man units would be required for 165 work days if the job were to run from May 1st to November 15th. 165 days times 19 man units per day equals 3135 man days. The differential in the man days as projected in said exhibits between the November 15th completion

and December 15th completion would be 3135 minus 3040 man days or 95 *additional man days.*

Mr. Brewer, on these exhibits, increased the 165 man days by 3 man units coming out with a product of 495 man days. He neglected to reduce this number by the 400 man days that were eliminated as the result of 16 men working 25 days less, i.e. 165 work days instead of 190 work days. This differential of 95 man days based on an 8-hour day would represent 760 additional hours. Even using the unit price of $8.10 shown on Exhibit 9, this resulted in projected increased costs to the appellee of only $6,156.00, a far cry from the $30,389.40 allowed under Schedule I. And it is interesting to note that the $8.10 is based on journeymen's wages of $5.65 per hour when in fact they ran from $5.25 per hour to $5.50 per hour (Ex. Z) and it is further based on an inefficiency factor of 15 per cent. Mr. Brewer used this same inefficiency factor on both Exhibits 8 and 9, one dealing with 8-hour days and the other dealing with 9-hour days which would indicate that in his opinion there is no greater inefficiency with respect to working 6 8's than 6 9's, this being diametrically opposed to the testimony of Mr. Urban.

Exhibits 8 and 9, notwithstanding the erroneous base wages used for journeymen, clearly indicate that based on a 19 man crew from May 1st to completion, appellee's own labor costs might be increased then approximately $6,000.00 irrespective of insurance and tax on labor. This flies directly in the face of the figure proposed in Schedule I by Mr. Urban.

Since, however, the job has been completed, it is not necessary to project the additional man days actually required. This information is available to us. Exhibit LL, which is a summary of the Peat, Marwick & Mitchell Co. recapitulation (Ex. Z) of the certified payrolls, shows that the average man units from May 1st to November 20th, the actual date of completion, was 18.1 men. The actual working days from May 1st to November 20th would be 170 which times 18.1 would give a product of total actual man days from May 1st to November 20th of 3077.

The differential then in man days for projected December 15th completion (3040) as compared to the actual additional man days used for November 20th completion (3077) is only 37 additional man days. This is not an estimate, it is a fact.

Thirty-seven additional man days based on the representative 8-hour day employed by Mr. Brewer would represent 296 hours. Using the $8.10 figure employed by Mr. Brewer on Exhibit 9 and multiplying that times the additional 296 hours would leave a total cost differential of $2397.60 exclusive of insurance and tax on labor.

Summarizing as to Schedule I, we submit in view of the gross misreprentations as to every substantive factual entry thereon and the testimony supporting it and the complete failure on the part of appellee to corroborate or substantiate the opinion entries on Schedule I and the testimony supporting it relating to production

factor and the indirect labor as well as the reason for working 6 9's, the testimony of Mr. Urban with respect to this schedule and the schedule itself should be disregarded in their entirety. The schedule and testimony in support thereof were obviously designed to mislead and the opinion evidence on the part of Mr. Urban being speculative and conjectural and not based on any personal knowledge on his part, does not rise to the level required to sustain appellee's burden of proof.

Neither did Mr. Urban testify that the costs claimed under this particular schedule were actually incurred or that they were reasonable. And if he had, not having any personal knowledge and based on the factual misrepresentations in that schedule, that testimony would not have been worthy of consideration.

Checklist; (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule II. (Finding XVI, R. 88-9).

The court allowed recovery for the first three items set forth on this schedule and declined recovery on the last item.

The first allowed item is $1361.72 being *small tool expense* figured, as Mr. Urban testified, at 2½ per cent of the claimed increased payroll (T. 198-9). This award is patently erroneous as the 2½ per cent is figured on $54,468.86 which was the sum claimed as additional payroll in Schedule I. The court cut this amount down to $30,389.40 (R. 89) but awarded 2½ per cent of the

claimed $54,468.86. Mr. Urban, the only person testifying as to small tool expense, stated that this 2½ per cent was a figure his company used in their business (T. 198). There was no substantiation of this fact or any testimony to the effect that this was a reasonable amount or that these costs were incurred. This item is not based on new tools for additional plumbers but is based on the same tools for the same plumbers working the ninth hour. This would not increase their costs for small tools at all, in fact, it would reduce the cost as compared to hiring additional plumbers in lieu of the regular plumbers working the ninth hour.

Rental of four portable gas welding machines. Hearsay (T. 247). No testimony was given as to what period any machines were rented other than the "3½ months" unsupported recitation on the schedule. Mr. Brewer testified that *two* welding machines were rented sometime during July, August and September—not four (T. 116). He did not testify as to the length of rental time during those months nor did he give any testimony as to rental paid or what constituted a reasonable rental. Neither did Mr. Urban give any testimony as to the reasonable rental (T. 199, 247).

The next item of allowance in Schedule II was for rent of one *6-passenger pickup truck, 5½ months times $225.00.* We call the court's attention to Exhibit N wherein Mr. Brewer urgently requested additional transportation because of the condition of the equipment he then had at the site. The memo will show that the sole reason for the pickup was because of the poor equipment

at the site and not because of any increased demands, and further shows that this transaction was between Mr. Brewer and Mr. Urban, Sr., deceased. It is true that Mr. Fred Urban testified that the pickup was required because of increased manpower, even though he had no personal knowledge. There is no support for this assertion either in Exhibit N or in the payroll sheets.

Further, there is absolutely no showing whatsoever as to what the reasonable value of such a rental would be (T. 201). This pickup was not rented, it was purchased by Urban. Mr. Urban testified that he did not know the rental charges of Volkswagen pickups in the Fairbanks area (T. 249). This testimony is not sufficient to establish reasonable rental.

In addition, these are all overhead items; nonetheless the court allowed 15% overhead on these overhead items and, in addition, allowed 10% profit on rental of appellee's own equipment directly contrary to this court's holding in *Central Steel Erection Co. v. Will*, supra.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule IV. (Finding XVI, R. 88-9.)

Additional special shipment costs, $3,043.31.

The court allowed the first three items of Schedule IV. Mr. Urban gave the only testimony with respect to this schedule. He advised that on the first three items the figures were partially prepared by him and partially prepared by a Mr. Way (T. 207). He further testified that

Mr. Way gave him certain invoices which, Mr. Way said, were incurred as a result of acceleration and Mr. Urban merely recapped them (T. 208).

There was no substantiation of this hearsay testimony either by original invoices, which are the best evidence, which appellants requested be produced, (T. 205-7, 251-4) nor was there any substantiation by Mr. Way, who was appellee's office manager or by Mr. Brewer or Mr. Martindale who may have had some knowledge concerning the entries included on that exhibit. Again, these were overhead items on which the court allowed an additional 15% overhead and 10% profit, (Finding XVI, R. 88-9) contrary to this court's holding in *Central Steel Erection Co. v. Will,* supra.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule V. (Finding XVI, R. 88-9).

Increased cost of subcontractors—$4,452.48.

With respect to this schedule the court awarded the Read Sheet Metal Company item, not as set forth, but in the sum of $4,452.48. First of all, we should like to point out that appellee, in this schedule, grossly misrepresented the Read Sheet Metal Company estimate of additional costs, it being itemized at $5,797.20 whereas, in fact, per Read's letter of August 7th, 1962, the amount was $3,854.96. Mr. Urban once again prepared this schedule. He testified he obtained Read's figure from Mr. Brewer—hearsay once more (T. 255). Exhibit 17, being Mr. Read's proposal, was admitted in evidence over ob-

jection (T. 79). The important part of Mr. Read's testimony is that his proposal (Ex. 17) to Mr. Brewer was made on the premise that he would have to complete his work by the 15th of September, 1960 (T. 78, 83-5). He actually completed everything on September 19, 1960 (T. 83), thereby indicating that he was shooting for a September 15th target, and he didn't overrun his original man day estimate (T. 80). Mr. Read very candidly then went on to say with respect to scheduling his work and increased costs that it would have made a great difference if he had known that he actually had until October 15th, 1960, in which event there would have been no additional costs (T. 85).

There is absolutely no testimony whatsoever by anyone to the effect that Read Sheet Metal sustained any increased costs based on October 15th completion, or any completion date, or the reasonable value of any such costs.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule VI. (Finding XVI, R. 88-9).

Labor doubletime cost—$5,833.50.

This schedule and the testimony in support thereof are subject to the same shortcomings of proof as the previous schedules. The only testimony supporting this schedule was given by Mr. Urban (T. 212-14). He merely testified that the doubletime hours were given to him by Mr. John Way, his office manager (T. 212, 257), and that

the hours shown on this schedule represented doubletime worked over and above that called for in a 54-hour week. He went no further. How can this bare testimony establish this item as having been incurred as a consequence of acceleration or establish the reasonable value? Mr. Brewer and Mr. Martindale, who were present in court and were the only witnesses we know of who were competent to testify in support of this schedule, were not examined concerning it. It is interesting to note, however, that Mr. Martindale did testify there was very little doubletime – two or three times only (T. 68), without attempting to attribute it to "acceleration."

Furthermore, this is a duplication of the hours already included in Schedule I for which the trial court allowed "increased labor costs" of $30,389.40 in Finding XVI (R. 89). The total hours of all types—straight time, time and a half and doubletime, (shown as O.T.) taken from the payrolls (Ex. Z.) and summarized on Exhibit LL, from August 7th through November 20th, 1960, were 16,212. This was called to the court's attention in appellant's objections to Memorandum of Decision (R. 78) whereafter the court revised its Memorandum of Decision to allow only for that number of hours instead of 28,819½ running from May 1st through November 20th. The court used a factor of increased labor costs of $1.8745 per hour, it having reduced the insurance and tax on labor from 13% to 11% (which, multiplied by 16,212 hours, gives a product of $30,389.40). An analysis of Exhibits Z and LL will show that *all* doubletime hours from May 1 to November 20 were already included and the doubletime

hours referred to in Schedule VI are a duplication.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule VII. (Finding XVI, R. 88-9).

Mobilizing and transportation of additional plumbers—$2,499.12.

Mr. Urban once again was the only witness testifying in support of this schedule. He stated that he prepared the costs (T. 214) he did not indicate from what source or invoices these costs were prepared, if any. He stated that he determined from Mr. Brewer his estimate of the number of additional men engaged and that the 50% turnover item in the sum of $833.04 he doesn't know about, that was just an estimate (T. 214-15). So, here again, we have an estimate with no personal knowledge (T. 260) based on hearsay. As to this schedule, the court should have exercised its own judgment and determined that a plane trip of approximately 60 miles from Fairbanks to Clear being approximately a one-half hour ride could not result in the incurring of any additional subsistence or travel pay in excess of approximately one hour which would be approximately 1/10 of the claimed travel pay. And where is there any evidence supporting the subsistence claim for which recovery was allowed?

This schedule actually infers that 18 plus 9 or 27 additional men were required at Clear, notwithstanding Mr. Brewer's estimate that 3 additional men would be required (Exs. 8 and 9) or assuming a 50% turnover, 4½

additional men. Once again, Mr. Brewer and Mr. Martindale were the only competent witnesses to the contents of Schedule VII. They were not examined with respect to it.

Checklists (1) Extra work—NO; (3) Appellant's request — NO; and (3) Reasonable value — NO.

Schedule VIII. (Finding XVI, R. 88-9).

Increased camp subsistence cost—$12,600.00.

Under this schedule appellee claimed the amount stated. Mr. Urban on direct examination testified that this schedule was prepared by Mr. Way and consisted of an estimation by Mr. Way (T. 215-16). This is hearsay compounded by conjecture. On cross-examination he testified that he had no knowledge of its contents that he did not prepare the schedule (T. 261). Neither did Mr. Brewer nor Mr. Martindale give any testimony with respect to it. There is no evidence whatsoever in support of it.

The court, over objection (T. 216) permitted evidence on this item under the "Federal Shop Book Rule" as coming from the "records of the company." There was no foundation laid by appellee to support this ruling. It is quite obvious that the court, with respect to all of these schedules, was laboring under some misapprehension as to the source of the information being summarized. While this record is replete with glaring errors, there is no more obvious one than in permitting recovery on this schedule. The only two references to it in the entire record appear on pages 215-16 and 261.

It is interesting to note that the court in its Memorandum of Decision (R. 71-6) reduced this amount to $7,356.00 and in Paragraph 11 thereof, set forth the basis of its computation. The court therein explained that this was computed by reference to Exhibit 9 which reflects a total of 558 man camp days. The 558 man camp days in Exhibit 9 included 495 days for Urban. We believe we have shown with clarity under the discussion relating to acceleration, pages 36 through 38, that the actual additional man days for Urban were 37. Also included in the 558 days is 30 man days for Read Sheet Metal. Reference to Exhibit 17 shows that 30 man camp days were included in Read's billing to Urban and were already allowed by the court in the total amount set forth under Schedule V. In addition the 33 man days for Fiberglass appearing on Exhibit 9 going to make up the 558 days figure should not be allowed as the Fiberglass Insulation Company claim under Schedule V was disallowed. With reference to the 48 man camp days for connecting kitchen equipment and 7 man camp days for connecting water and drains to refrigeration equipment referred to in the memorandum decision, these are merely items set forth on certain of appellee's exhibits with absolutely no substantiation or testimony as to what additional time was required.

The court in its Memorandum Decision allowed 613 man days as set forth in Paragraph 11 or a total of $7,356.00. Thereafter in some fashion or another, this was erroneously increased to $12,600.00 in the Findings

and Judgment. There was no evidence to support either amount.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

We submit with respect to all of Exhibit 29 insofar as Mr. Urban's testimony is concerned, there was a complete lack of *KNOWLEDGE* on his part of the facts relating to cost or reasonable value, or what transpired, and on this complete lack of knowledge or personal observation he impounded his personal opinion. If this is not speculation and conjecture, what is the meaning of these words? His expressions of opinion and his computations in Exhibit 29 were based in part on hearsay evidence received from Mr. Way (and Mr. Way was not present in court) in part on hearsay from Mr. Brewer, and in part on guesswork of his own not even based on hearsay. Presumably if the basic facts supporting Exhibit 29 had been developed through witnesses having a personal knowledge such as Mr. Brewer or Mr. Martindale, Mr. Urban could have given his opinion as to reasonable values based on hypothetical questions, if he had qualified as an expert. This, of course, was not attempted. Having no personal knowledge of the facts through personal observation or otherwise, Mr. Urban was not competent to state an opinion as to costs or reasonable values and the court erred in receiving or considering his testimony with respect to all of Exhibit 29; as well as the exhibit itself.

Wigmore 3rd Edition treats with this subject and

clearly Mr. Urban's testimony should not have been received under the following pertinent portions of Wigmore.

> "§ 657(a). The first corollary from the general principle of knowledge is that what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses,* not from the reports of others—in other words, must be founded on personal observation and this general rule, to which contrary instances can be only casual exceptions, has long been recognized as fundamental."
>
> "658(b) (3). 'Belief' or 'impression' may signify a *lack of actual personal observation;* when this is the case the main principle (lack of knowledge) excludes such testimony."
>
> "What the courts repudiate then is a mere guess, an exercise of the imagination, suspicion, and conjecture offered in place of the result of actual personal observation; it is from this point of view only that a 'belief,' 'opinion' or 'impression' is not to be received."

And it is equally clear that as a condition precedent to testifying as to value it must be shown that the witness has a knowledge of value in the vicinity in question. I Wigmore 3rd Edition 718, *U.S. v. Jones,* 176 F.2d 278 (9th C.A. 1949).

Absent any competent evidence which we believe has been demonstrated,

> "It is elementary that compensatory damages can not be allowed unless there is satisfactory evidence to support them . . . the law requires the production of the best evidence available." *KOWTKO v. Delaware,* 131 F. Supp. 95.
>
> "The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of prov-

> ing the amount of loss with sufficient certainty so that determination of the amount of damages will be more than mere speculation." *Willems Industries Inc. v. U.S.*, 295 F.2d 822 (1961), U.S. Ct. of Claims.

In *Scholes Inc. v. U.S. for the use of H.W. Moore Equipment Company*, 295 F.2d 366, (10th C.A. 1961) while the court held that the evidence was sufficient to make a fair and reasonable approximation, it further stated unequivocally that "recovery of monetary reparation cannot be predicated upon speculation and conjecture."

In *Hoffer Oil Corp. v. Carpenter*, 34 F.2d 589, (10th C.A. 1929) the court held damages must be proved through the opinions of well-informed persons, bearing out the rule expounded by Wigmore.

In *Plymouth Village Fire District v. New Amsterdam Casualty Company*, supra, testimony with respect to damages was based on records admitted into evidence made by others than the witness, which the court rejected. The court stated:

> "The greater portion of data from which these records were compiled was furnished to the engineers by the substitute contractor and in no instance were its contemporaneous daily records before the court. Opportunity to examine these and to determine their veracity and accuracy was not available to counsel. In this connection, there was lacking in evidence the quantum and locale of the work allegedly done."

Appellee succeeded in influencing the trial judge in believing that appellant had received some substantial windfalls with respect to changes in the subject contract as well as changes in Contract 1282, which was a com-

plete and separate contract in which appellee was not involved (T. 607-8) (Finding XI; R. 85-6) (T. 532). It accordingly admitted into evidence Exhibits 34, (T. 300) 35 (T. 300) and 41 (T. 404) (Specification of Errors VII E, F and G) and testimony of Mr. Haskell (T. 532-3) (Specification of Errors VII F) all over objection. The court, in Finding IX (T. 85-6) went on to specifically find that part of the camp "maintenance" required for Contract 1302 was included in Contract 1282 (Specification of Errors I. E). Reference to these exhibits will clearly show that they merely included allowance for camp facilities, to-wit: housing and mess hall, no maintenance or feeding.

The uncontroverted evidence as given by Mr. Bernardi (T. 450-7, 499) and Mr. Baker (T. 623-31) was that there were no additional costs involved in setting up the date for Contract 1302, that there were substantial additional costs with reference to changes in 1282, including additional housing, messing, liability for fire (T. 625-6) and that the distribution of the available funds by the Corps of Engineers between Contracts 1302 and 1282 was done ex parte and arbitrarily.

Baker & Ford did not request any additional funds with respect to either contract for subcontractors for acceleration, which a reference to Exhibit 33 will confirm. As pointed out by appellee's witnesses, the acceleration items were actually allowance for the major fire on Contract 1282, under a different name (T. 453-7, 625-6).

No other subcontractor on either of these contracts

submitted a claim for acceleration costs, nor was any other subcontractor paid therefor. This is certainly indicative of the fact that there was no acceleration (T. 485).

Also worthy of note in this regard, although it certainly is irrelevant, is that under Mod. 6 the Government arbitrarily awarded Baker & Ford $146,276.00 for setting the previous dates up by one month and, in addition required abandonment of warehouse B, erection of a new warehouse and subsequent demolition thereof (Ex. 25, 26), the costs not being segregated. For all the record indicates, this entire amount could be for the warehouse itself. However, for purposes of argument, we will assume that the entire sum was in consideration of the stepped up dates. This would represent 4% of the prime contract which was for the amount of $3,666,499.00. 4% of the principal amount of appellee's subcontract, which was for a total of $669,500.00, would be $26,780.00. Under the present judgment, the court proposes to award appellee $80,519.24, leaving only $65,756.00 to the prime contractor for its so-called acceleration costs, including all of the warehouse work. The absurd result is, that the subcontractor receives an amount equal to 12% of its contract and the general contractor is left with an amount equal to .018% of its contract.

Irrespective of the foregoing, we submit that where the general contractor did not specifically make any claim and recover any amount for the subcontractor, the amount the prime contractor received has no bearing whatsoever on what the subcontractor is entitled to, and the considera-

tion of the exhibits and testimony in this regard by the trial court was error.

Appellee, subcontractor, is entitled to the reasonable value of its work and material if a substantial change has been ordered.

What, if any, compensation was paid to the prime contractor for the changes in question can have no bearing on the amount to which the subcontractor is entitled should be obvious for the following reasons: (1) Appellee was not a party to the original contract and its rights arise solely out of its subcontract with appellant, (2) the provisions for price adjustments and the undertakings of the parties in the original contract on the one hand and the subcontract on the other are quite different, (3) the considerations involved in the settlement between the prime contractor and the government, and the prime contractor and the subcontractor are quite different, and (4) the rule of law above stated, which is quite clear, that irrespective of any other considerations as between these parties, the party performing, in this instance the appellee, is entitled to the reasonable value of its service based on the reasonable cost of the materials furnished, labor performed and a reasonable allowance for profit.

This is illustrated in the case of *Adam J. Lanehart v. United Enterprise, Inc.*, 226 F.2d 359. It is an action by a sub against a general contractor involving a government contract. The government and the prime contractor entered into a supplemental agreement deleting certain work. The prime contractor and the government then

substituted other work in place of the deleted work. The sub contends that because the prime contractor eventually received funds included in the contract for the deleted work that those funds should in turn be passed on to him. The court in answer to this contention stated that the mere fact that United Enterprise, Inc., the prime contractor, ultimately received all or part of the funds does not entitle the subcontractor to them. And as pointed out in *U. S. v. Hensler,* 125 F. Supp. 887 (1954) the fact that the prime contractor settled with the government for a lesser sum than the subcontractor was entitled to would not be binding on the subcontractor.

Part Two—Items of Work.

Turning now to Finding VII (R. 84-5) (Specification of Errors I. B, C & D) the court permitted recovery for four specific claims.

With respect to these items there is no dispute in the evidence. We will accordingly treat with the evidence as to the items contained in this Finding in the light most favorable to appellee.

Finding VII(a). *Connection kitchen equipment — $3,722.43* (R. 84) (Specification of Errors I. B, II B, VII C, IX A, IX B). The only direct testimony on this item was given by Mr. Martindale, appellee's foreman. He stated that Mr. Ference, one of appellant's superintendents, directed him to do the work but that Mr. Ference did not agree to pay any additional amount therefor (T. 39, 62, 63). He further stated (T. 62) along with Mr. Haskell, the only impartial expert witness testifying (T.

536-540) that this work fell within the jurisdiction of the plumbers and Mr. Haskell testified that as a master plumber of extensive experience, the undertaking to do "all mechanical" in a subcontract such as this one (Ex. H) means all work falling within the jurisdiction of the United Association of Plumbers and Steamfitters; (also Mr. Urban (T. 289) and Mr. Baker (T. 604-605)) therefore, it was not extra work (T. 536-540). There was no testimony whatsoever regarding the reasonableness of the value of the work. Plaintiff's Exhibit 21 (invoice) was admitted (T. 39) over objection (R. 57) as no proper foundation, (Specification of Errors VII. C), and no identification whatsoever was made thereof nor was there any substantiation of its contents or showing by whom or from what source it was prepared. The only testimony relating to value was given by appellee's superintendent, Brewer, who stated that "to the best of my knowledge" this exhibit represented the additional cost (T. 94-95). There is no showing that Mr. Brewer had any knowledge of the costs or what was done or that he even saw the work, he stating that he merely had Mr. Martindale keep a separate breakdown.

Check-list: (1) Extra work—NO; (2) Appellant's request—YES; and (3) Reasonable value—NO.

Finding VII(b). *Connecting water lines and drains to refrigeration equipment—$503.78* (R. 84, 85) (Specification of Errors I B, II B, VII B, IX A, IX B). The testimony, or lack of it, is identical with that set forth with respect to Finding VII(a) above. Mr. Martindale, appel-

lee's foreman, gave the only testimony directly bearing on this item stating that appellant's superintendent, Ference, instructed him to do the work (T. 41) and that there was no agreement to pay for it (T. 62). Once again, Mr. Martindale (T. 62) and Mr. Haskell (T. 536-540) stated that this is plumber's work and Mr. Haskell testified that in his interpretation and in the practice of the trade, "a subcontract calling for 'all mechanical' (Ex. H) includes all work falling within the jurisdiction of the United Association of Plumbers and Steamfitters" (T. 536-540) (also Mr. Urban (T. 289) and Mr. Baker (T. 604-605)).

Plaintiffs' Exhibit 19 (Invoice) (Specification of Errors VII. B) was admitted (T. 41) over objection (R. 57) but was not in any way identified or substantiated at the trial excepting by Mr. Brewer and it is apparent from his testimony that he had no personal knowledge of the entries contained on the exhibits (T. 94, 95). Neither was any valid testimony given with respect to the reasonable value of this item (T. 40-42).

Check-list: (1) Extra work—NO; (2) Appellant's request—YES; and (3) Reasonable value—NO.

Finding VII(c). *Installing grease interceptor extensions —$2,559.00* (R. 85) (Specification of Errors I. C, II. B). Mr. Martindale for appellee, once again gave the only testimony bearing directly on this item (other than testimony of Mr. Brewer and Mr. McGonigal, appellant's office manager, directed solely to whether it was performed and the necessity thereof). Mr. Martindale stated that

he had no discussions with any of appellant's representatives regarding this installation, it was not done at their request, but pursuant to instructions received from Urban's Portland office (T. 45). There was no testimony whatsoever regarding the time or materials used or the value thereof or that this work was ordered by appellant. The only reference in the trial record in this regard is the statement by Mr. Martindale that he kept a record and turned it into his emloyers (T. 45). No such record was ever offered. Once again, this work would be required under "all mechanical" it being plumber's work. (T. 536-540; 289; 604-605).

Check-list: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Finding VII(d). *Repairing water main leaks—$2,586.00* (R. 85) (Specification of Errors I. D, II. A, II. C, VII. A, VIII. A). Per plaintiff's Exhibit 3 (letter from appellee to appellant) admitted (T. 60) over objection (R. 55) referring to the alleged repair of three water main leaks. This letter, with respect to its source or disposition, was never identified by anyone.

Mr. Martindale stated that Mr. Huntington of Baker & Ford, instructed him to fix "the first one (leak) that occurred" (T. 43). There is no testimony that anyone else instructed appellee to fix any additional leaks. Mr. Brewer, for Urban, testified that he was present at the repair of one break (T. 99). There was no substantiation of the materials or labor used on the one leak authorized, let alone three leaks referred to in the exhibit. At

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most, Mr. Martindale testified that the breakdown on the exhibit fairly represented the "labor and material that went into the repair of the water line in 1959" (T. 60), or that the amount was a reasonable charge "over the period of fixing the water lines" (T. 43). But, it is quite apparent that Mr. Martindale was referring to the full period of 1959 and possibly 1960 with no reference to the number of leaks involved. Mr. Brewer's testimony, over objection (Specification of Errors VIII. A) that the amount was fair and reasonable should not have been admitted and was nothing more than a voluntary conclusion as he had, according to his testimony, only knowledge of the repair of one break (T. 99, 100, 101, 121). It is interesting to note that Mr. Martindale stated that the sum is a fair figure for repairs for 1959 in connection with Mr. Brewer's testimony that there were, in addition to the one break authorized by Baker & Ford, thirteen to fifteen breaks just prior to Baker & Ford taking over (T. 98, 101).

There is no showing on the part of appellee that the repair of these water line breaks was in connection with Contract 1302 (T. 648-9) and the court so found, the court only having gained jurisdiction of this controversy under the Miller Act because the work was performed in its district. There is no basis in law for the court claiming ancillary jurisdiction as to this item.

Check-list (1) Extra work – NO, at best only one leak repair and this certainly not under contract 1302; and (2) Appellant's request—only to the extent of one leak

repair; and (3) Reasonable value—NO; the testimony respecting such certainly not rising to the required level of proof.

With respect to Findings VII (a), (b) and (c) discussed above, under a subcontract such as this where the appellee agrees to do "all mechanical work for a complete installation," inherent in construction work is the subcontractor's responsibility to "furnish a complete installation ready for operation." The specifications (Ex. II) Section 31.03, paragraphs D and E and Section 31-33, respecting the grease interceptors, specifically impose this duty. This interpretation is substantiated in the following recent case: *Unicon Management Corp.*, 65-1 BCA, para. 4827. That case before the Veteran's Administration Contract Appeals Board, No. 463, decided April 26, 1965, holding:

> "Even though drawings did not provide for steam service connections for steam-operated kitchen equipment, a contractor was required to provide such service lines under the contract because the specifications, which required that 'equipment furnished . . . shall be installed complete, . . . ready for operation,' warned that some of the necessary work might not be described in the contract documents but left to the initiative and responsibility of the contractor."

Part Three—Prior Agreement in Writing as to Extras.

This has reference to Finding XIV (R. 99) (Specification of Errors I. N) respecting the clause in the subcontract (Ex. H(e)) to the effect that no claims for extras shall be made unless fully agreed upon in writing prior to the performance of any such extra work. Find-

ing XVI asserts that "Baker & Ford Company waived the provisions of the subcontract requiring notice and written directions and agreement as to extras by verbally directing the same . . ." In each instance where appellee's three witnesses were examined in this regard, they testified that no verbal directions were given. (Martindale, T. 66; Brewer, T. 129-31; Urban, T. 276-7). In fact, Mr. Martindale testified that even if Baker & Ford Company had attempted to tell him how to conduct his operations he wouldn't "listen to them anyway"—that was between him and Mr. Brewer (T. 65). The only verbal directions testified to in the record are for "extra work" such as trailer camp and barracks (T. 58-9) which were not a part of Contract 1302 (T. 118-20), and some insulation work in the attic which was a part of 1302 (T. 97), but which was not ordered and performed until December of 1960, after the basic contract work was completed and turned over to the Government (T. 121).

Accordingly, there is no support in the evidence for that portion of Finding XVI above quoted, or the further finding in the same paragraph that "written directions . . . from defendant to use plantiff were often not issued until after extra work had been accomplished."

The pertinent law, relating to the necessity of proving waiver of a provision in a building contract requiring a written order, is set forth on page 28 hereof. Language from the annotation in 66 A.L.R. 649 follows:

> "Stipulation in building and construction contracts, requiring written orders for any alterations or extras

are universally held to be valid and binding upon the parties in the absence of a waiver, modification or abrogation thereof." (at page 651)

"There can be no recovery for extra work ordered by the owner under the condition that it is not an extra but is included in and required by the original contract, although the contractor performs the work under the claim that it is an extra not covered by the contract." (at page 681)

"It is well settled that, in the absence of conduct showing a waiver or modification of a stipulation requiring a written order or agreement for alterations or extra work, or establishing an independent contract for the performance of such alterations or extra work, no recovery can be had therefor by the contractor without a writing in compliance with the provision."

"The foregoing rule has been applied although the extra work was necessary to a performance of the contract (*Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573), and although the extra work was made necessary because of errors in the specifications furnished the contractor by the owner's architect (*Taub v. Woodruff*, 63 Tex. Civ. App. 437, 134 S.W. 750; 152 S.W. 1193)."

"Thus, in *Michaud v. MacGregor*, 61 Minn. 198, 63 N.W. 479, the court said: 'The legal effect of provisions of this kind in building contracts is to prevent the contractor from recovering payment upon an implied promise, for extras, in excess of the contract price, by simply showing that they were not included in the original contract, but were necessary for the completion of the building, and that he furnished them. He must go further in his proof, and show that the provision has been directly or indirectly waived by a subsequent valid contract, or by such conduct on the part of the owner of the building as equitably estops him from insisting on

the provision; for it is binding on the parties unless such facts are alleged and proved as relieve them from its obligation.' "

"To permit a recovery, even on a quantum meruit basis, without a writing as required by contract, would be to deny the owner the benefit of written evidence, and to subject him to the uncertainties of parol proof, depending on the fluctuating opinion of other persons as to the character and the value of the work, and to bind him against his will. *Baltimore Cemetery Co. v. Coburn,* 7 Md. 202."

If appellee believed it was doing work beyond the scope of the subcontract as alleged, it should have stayed within the explicit terms of paragraph (e) thereof with which it must have been, in its long experience well familiar, it being a form subcontract issued under the auspices of the Associated General Contractors (See Ex. H).

This relates to all of the items discussed under Parts One and Two of this argument.

Part Four—Interest.

(Finding XVIII; R. 99) (Specification of Errors I. M and II. B).

This relates to the award of interest. Interest is not allowable, of course, on unliquidated claims, *Central Steel Erection Co. v. Will, supra.* Reference to Exhibit 31 indicates that the court allowed interest on the first four items, disallowed it on the fifth item. Without prolonging this argument by a discussion of whether these were liquidated or unliquidated indebtednesses, suffice it to say that paragraph (c) of the subcontract provides:

"Final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work. . . ."

The court found (Finding V, R. 83) that appellee did not complete its work under the subcontract until October 1961. The first three items of Exhibit 31 show they were paid on April 21, 1961, October 16, 1961 and November 14, 1961, all within the requirements of the subcontract. Further, item No. 3 of Exhibit 31 has reference to temporary work (T. 96, 118-20, Ex. U) which is not a part of Contract 1302 and hence not within the trial court's jurisdiction.

Part Five—Attorney Fees.

(Finding XX, R. 90-1; Conclusion IV); (Specification of Errors I. O and II. D). Allowance to appellee of $6,500.00 attorney fees.

Appellee brought this action seeking recovery of $216,391.85 (Ex. A. to appellee's complaint). The court awarded it the sum of $87,304.45 exclusive of interest and attorney fees which represents 40% of the principal amount asked. In other words, the appellants actually prevailed. While the allowance of attorney fees lies in the discretion of the court, we submit that the appellants could not have in good conscience paid the amounts sought by appellee and were justified in contesting them, particularly where they represent unliquidated damages.

As pointed out in *Macri and Sons v. U.S.*, 313 F.2d 119, (9th C.A. 1963) Alaska, "where a substantial controversy exists . . . no allowance may be made." Accord:

U.S.A. for General Electric Co. v. Brown Electric Company, (D.C. Virginia 1959), 168 F. Supp. 806, and as pointed out by Judge Hodge in *U.S.A. for Miller and Bentley v. Kelly,* 192 F. Supp. 274, even though the plaintiff obtained a judgment for a portion of its claim, both sides were entitled to attorney fees as the defendant successfully defended the major portion of plaintiff's claim, which is the case here.

Part Six—Bond Premium, Business Tax, Overhead and Profit.

The court in Findings XV and XVI (R. 88-9) (Specification of Errors I. K) determined an allowance for overhead, profit, Alaska Business Tax and bond premium. We have, in Part One of this argument, dealt with the erroneousness of the awards of overhead and/or profit with respect to items of overhead included in Exhibit 29.

With respect to the Alaska Business Tax, this is beyond the scope of the prayer of the appellee's complaint as was the bond premium (R. 33-8). Furthermore, there is no evidence that either was due and by the terms of the subcontract (Ex. H) the bond was furnished by the general contractor, appellant herein.

Part Seven—Jurisdiction.

(Conclusion I; R. 91; Findings VI and VIID; R. 82) (Specification of Errors I. A and D, II. A).

Appellee alleged jurisdiction under the Miller Act, 40 USC 270a-270e, and under 28 USC 1331 and 1332 (R. 33). The jurisdictional question was put at issue by appel-

lant's answer (R. 41). The court found jurisdiction only under the Miller Act.

The last labor performed and material furnished by appellee was in October 1961 (R. 83). This action was commenced October 31, 1961 (R. 83), less than 90 days after the last work was performed. Appellants contend that it was prematurely brought under 40 USC 270b.

Appellants further contend that under the pleadings, the court erroneously assumed ancillary jurisdiction over appellant, Baker & Ford, with reference to repair of water main leaks (Finding VII D; R. 85), it not having jurisdiction under the Miller Act.

CONCLUSION

The legal principles involved herein relative to admissibility of evidence, quantum of proof and the right to and amount of recovery, are well settled. The application of those principles to the evidence presented on behalf of appellee should have been relatively simple. The conclusions of the trial court to the effect that there was extra work beyond the scope of the contract flies directly in the face of all of the testimony that there was no change in completion dates as between the parties following the issuance of construction schedule (Ex. I) on April 22, and that appellee did not even know of any "acceleration" of the main contract until several months after the work was completed.

The testimony relative to reasonable value of any extra work performed, given only by Mr. Urban, surrounding

Exhibit 29, was, in its entirety, incompetent. Nonetheless, the trial court adopted it as its findings.

The trial court, above and beyond arriving at erroneous and unsupported findings and conclusions, demonstrated his lack of familiarity with the law and the evidence in the following obvious instances in his Memorandum of Decision (R. 71):

(1) In computing increased labor costs per Exhibit 29, Schedule I, based upon a 54-hour week from May 1st to job completion or 28,819½ hours when all of the evidence shouted that a 54-hour week had not been adopted by appellee until August 7th.

(2) Allowing increased camp subsistence costs per Exhibit 9 to the extent of 613 days, which exhibit, on the face of it, showed that appellee's additional man days would only be 95; and the court including in that amount 30 man days for Read Sheet Metal which had already been allowed, and in including 33 man days for Fiberglass Engineering, whose claim was disallowed; and after this error was called to his attention (R. 78-9), reverting to the unsubstantiated sum of $12,600 set forth in Schedule VIII, Exhibit 29.

(3) Allowing interest to date of judgment, to-wit: October 5th, 1964, on certain sums (R. 76), all of which had been paid in 1961 with the exception of the minor item of $4,967.13, which was paid in 1962.

(4) In allowing for double-time hours in Schedule I, Exhibit 29, and duplicating that allowance in Schedule VI of the same exhibit.

It is also interesting to note the obvious inconsistencies of the court in admitting and considering evidence; in admitting Exhibits 34, 35 and 41, for instance, dealing with a different contract entirely, Number 1282; but rejecting offered Exhibits 42 and 43 because they related to Contract 1282 and not 1302; and the rulings of the trial judge in permitting evidence relating to Exhibit 29 under the "Federal Shop Book" rule at a time when the records, if any, from which the summaries were made were not available for cross-examination, but rejecting similar summaries proposed by appellants until such records were obtained, necessitating an overnight trip during trial from Fairbanks to Bellingham, Washington, and return by appellant's witness, McGonigal (T. 561-79, 593, 700).

Appellants are at a complete loss to explain or rationalize the erroneous and inconsistent treatment of the evidence by the trial judge, but submit that one adopting an objective approach thereto cannot but be convinced that the judgment was manifestly erroneous and the result of either prejudice or a complete misapprehension and misapplication of the evidence and the law.

This trial was originally set for hearing in Anchorage for April 1st, 1964. It was transferred to Fairbanks and came on for hearing on April 2nd, 1964, because of the major earthquake which struck Anchorage the previous Friday. Whether the judge, during the course of the trial, was preoccupied with concern over that major disaster, we have no way of knowing. We are convinced, however, that his treatment of the evidence herein makes it ap-

parent that this judgment should be set aside and appellee's action dismissed with judgment for costs and attorney fees for appellant.[2]

Respectfully submitted,

MIKE STEPOVICH
BRUCE T. RINKER
Attorneys for Appellants

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2. Note: All of the errors urged herein were presented in detail to the trial court prior to entry of judgment. (T. 717-56) (Memorandum, R. 106-45).

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

MIKE STEPOVICH
BRUCE T. RINKER
Attorneys for Appellants

APPENDIX A

APPELLEE'S EXHIBITS

No.	*Description*	*Identified*	*Admitted*	*Rejected*
1	Letter dated 10-5-61 to Baker & Ford from Corps of Engineers	Pre-trial	Pre-trial	
2	Letter dated 10-19-61 to Baker & Ford from Corps of Engineers	Pre-trial	Pre-trial	
3	Letter dated 8-3-59 to Baker & Ford from Urban Plumbing & Heating	Pre-trial	60	
4	Letter dated 9-4-59 to Baker & Ford from Urban Plumbing & Heating	Pre-trial	12	
5	Letter dated 5-25-60 to Urban Plumbing & Heating from Fiberglass Co	Pre-trial	110	
6	Inter-Office memo dated 2-16-61	Pre-trial	Not offered	
7	Inter-Office memo dated 3-19-61	Pre-trial	Not offered	
8	Original submittal, undated, in amount of $78,379.23	Pre-trial	109	
9	Submittal to L. Bernardi, prior to May 21, in amount of $48,470.78	Pre-trial	109	
10	Subcontract dated 5-8-59 between Patti-MacDonald Const. & Urban Plbg. & Htg.	Pre-trial	Not offered	

No.	Description	Identified	Admitted	Rejected
11	Letter dated 4-3-62 to Contracting Officer from Urban Plg. & Htg.	Pre-trial	280	
12	Tabulation of air freight bills	Pre-trial		682
13	Proposal to Urban Plbg. & Htg. from Fiberglass, dated 3-26-59	Pre-trial	Not offered	
14	Tabulation of extras and labor, undated, in amount of $130,429.00	Pre-trial	Not offered	
15	Memo to Bob Brewer from F. Urban, dated 2-13-61	Pre-trial	Not offered	
16	Invoice from Peerless Pacific Co. dated 6-9-60	Pre-trial	12	
17	Letter dated 8-7-62 to Urban Plbg. & Htg. from Read Sheet Metal	Pre-trial	79	
18-A thru 18-I	File of correspondence	Pre-trial	12	
19	Invoice dated 11-18-60 from Urban Plbg. & Htg. to Baker & Ford	Pre-trial	41	
20	Memo dated 12-8-60 to L. Bernardi	Pre-trial	12	
21	Invoice dated 11-18-60 from Urban Plbg. & Htg. to Baker & Ford	Pre-trial	39	

No.	Description	Identified	Admitted	Rejected
22	Memo dated 9-29-59 to F. Urban from Bob Brewer	Pre-trial	Not offered	
23	Letter dated 10-23-59 to Brodie Nat'l from Urban	Pre-trial	12	
24	Letter dated 10-27-59 to Urban from Brodie National	Pre-trial	12	
25	Letter dated 4-29-60 to Baker & Ford from U. S. Army Engineers	Pre-trial	12	
26	Letter dated 6-24-60 to Baker & Ford from U. S. Army Engineers	Pre-trial	12	
27	Letter dated 1-29-60 to Contracting Officer from Baker & Ford	Pre-trial	12	
28	Letter to Baker & Ford from Contracting Officer	Pre-trial	12	
29	Urban's Acceleration claim	Pre-trial	277	
30	Plans, Composite Bldg., Clear, Alaska	228	229	
31	Figures re testimony of F. Urban	278	278	
32	Figures re testimony of F. Urban	297	297	
33	Letter 5-21-60 w/attachments	298	298	
34	Change Order 6-24-60	298	300	
35	Change Order 2-3-61	298	300	
36	Change Order 4-5-61	350	Not offered	

No.	Description	Identified	Admitted	Rejected
37	Bar Graph 7-6-59	389	Not offered	
38	Letter dated 10-9-59	389	Not offered	
39	Revised Construction Progress Chart dated January, 1960	393	Pre-trial	
40	Change Order dated 3-18-60	395	Not offered	
41	Acceleration of Const., 3-30-60	401	404	
42	Change Order dated 6-24-60	465		468
43	Change Order dated 3-11-61	466		468
44	Recap of manpower tabulation	685	687	
45	Payroll tabulation, May to Nov., 1960	687	692, 694	

APPENDIX B

APPELLANT'S EXHIBITS

No.	*Description*	*Identified*	*Admitted*	*Rejected*
A	Payrolls 1 through 67; and 69, 1959-1960	Pre-trial	Pre-trial	
B	Modification No. 15, 2 pcs., Contract No. 1302	Pre-trial	Pre-trial	
C	Letter dated 1-9-61 to Baker & Ford from Urban Plbg. & Heating	Pre-trial	Pre-trial	
D	Payrolls 1 through 4, October 1961	Pre-trial	Pre-trial	
E	Letter dated 12-5-61 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	Pre-trial	
F	Change Order w/ transmittal letter, dated 5-10-62	Pre-trial	Pre-trial	
G	Letter dated 5-15-62 to Corps of Engineers from Baker & Ford	Pre-trial	Pre-trial	
H	Copy of subcontract between Baker & Ford & Urban Plbg. & Htg. dated 6-25-59	Pre-trial	Pre-trial	
I	Original Bar Graph Chart, 1960	Pre-trial	12	
J	Letter 8-16-60 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
K	Summary of man days for week ending 5-8-60 5-8-60 through 12-1-60	Pre-trial	12	

No.	*Description*	*Identified*	*Admitted*	*Rejected*
L	Recap of man days	Pre-trial	12	
M	Plumbers' Invoice	Pre-trial	12	
N-1 thru N-5	Communications from R. Brewer	Pre-trial	12	
O	Original Contract between Corps of Engineers & Baker & Ford	Pre-trial	12	
P-1 thru P-3	Correspondence re electric water coolers	Pre-trial	12	
Q	Letter dated 4-28-59 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
R	Letter dated 7-7-59 with attached subcontract	12	12, 319	
S	Letter dated 11-18-60 to Baker & Ford from Urban Plbg. & Htg.	12	12	
T	Letter dated 2-24-61 to Baker & Ford from Urban Plbg. & Htg.	12	12	
U	Letter dated 11-14-61 to Urban Plbg. & Htg. from Baker & Ford	12	12	

No.	Description	Identified	Admitted	Rejected
V	Letter dated 5-10-62, attn: Mr. Davidson from Mr. Rinker	12	12	
W	Telegram dated 4-29-60	12	12	
X	Tabulation of labor	Pre-trial	12	
Y	Tabulation	Pre-trial	12	
Z	Letters dated 10-2-63 and 10-25-63 with time sheet summaries	Pre-trial	12	
AA	Letter 8-16-20 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
BB	Letter 11-17-60 to Urban Plbg. from Baker & Ford	Pre-trial	12	
CC	Letter dated 4-10-61 to Urban Plb. & Htg. from Baker & Ford	Pre-trial	12	
DD	Letter dated 4-10-61 attn: Mr. Davidson from Baker & Ford	Pre-trial	12	
EE	Letter dated 4-21-61, attn: Mr. Davidson from Mr. Rinker	Pre-trial	12	
FF	Letter 10-17-61 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
GG	Letter 10-19-61 to Urban Plbg. & Htg. from Baker & Ford	Pre-trial	12	

No.	Description	Identified	Admitted	Rejected
HH	Letter dated Sept. 2 to Baker & Ford from Corps of Engineers	139	139	
II-1	Specifications notebook	264	264	
II-2	Specifications notebook	313	313	
JJ	Statement of man days	559	567	
KK	Man days subsistence account	565	645	
LL	Breakdown of hours	589	592	
MM	Total man days	700	704	
NN-1 thru NN-4	Letters dated 7-15-60, 4-11-60, 11-5-59, 8-19-59	704	706	
OO	Letter dated 4-25-60	706		707